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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 ISABEL TORRES,

8 Plaintiff(s),

Case No. 2:18-CV-10 JCM (VCF)

9 v.

ORDER

10 BODEGA LATINA CORPORATION,

11 Defendant(s).

12  
13 Presently before the court is Isabel Torres's ("plaintiff") motion for partial summary  
14 judgment. (ECF No. 40). Bodega Latina Corporation, doing business as El Super ("defendant"),  
15 filed a response (ECF No. 46), to which plaintiff replied (ECF No. 47).

16 Also before the court is defendant's motion for partial summary judgment. (ECF No.  
17 41). Plaintiff filed a response (ECF No. 44), to which defendant replied (ECF No. 48).

18 **I. Background**

19 The instant action arises from plaintiff's three separate slip-and-fall incidents at the  
20 defendant's store on Sahara and Decatur. (ECF No. 23). Each incident was captured on  
21 surveillance video without sound. (ECF No. 40). The first incident occurred on April 30, 2017.  
22 (ECF No. 40 at 2). The video footage shows employees of the store cleaning large amounts of  
23 water near the deli counter. (ECF No. 44-4). These employees then place paper towels on the  
24 ground to both sides of the deli counter. *Id.* Plaintiff is then seen walking near the side of the  
25 counter and subsequently slips and falls. *Id.*

26 The next incident occurred on August 26, 2017. (ECF No. 44-5). A customer is seen on  
27 the video footage spilling liquid near the checkout line. *Id.* The customer is then given paper  
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1 towels by a cashier and the customer wipes up the spill. *Id.* Plaintiff walks through the area  
2 shortly thereafter and slips and falls. *Id.*

3 The final incident occurred on March 20, 2018. (ECF No. 44-6). An employee is seen  
4 mopping the area near the produce. *Id.* Plaintiff walks through the area later in the footage and  
5 once again slips and falls. *Id.*

6 Plaintiff alleges she suffered numerous injuries from these falls, including neck, low  
7 back, hip, leg, and cervical spine pain. (ECF No. 44 at 5–9). Subsequent to these incidents,  
8 plaintiff received a number of medical services for her injuries. *Id.* These treatments included  
9 surgery, chiropractic care, X-rays, MRIs, injections, and nerve blocks. *Id.*

10 Plaintiff now moves for summary judgment as to the first and second slip-and-fall  
11 incidents, while defendant moves for summary judgment as to the second and third slip-and-fall  
12 incidents. (ECF No. 40, 41).

## 13 **II. Legal Standard**

14 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
15 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
16 any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
17 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment  
18 is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S.  
19 317, 323–24 (1986).

20 For purposes of summary judgment, disputed factual issues should be construed in favor  
21 of the nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
22 withstand summary judgment, the nonmoving party must “set forth specific facts showing that  
23 there is a genuine issue for trial.” *Id.*

24 In determining summary judgment, a court applies a burden-shifting analysis. “When the  
25 party moving for summary judgment would bear the burden of proof at trial, it must come  
26 forward with evidence which would entitle it to a directed verdict if the evidence went  
27 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the  
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1 absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage*  
2 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

3 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
4 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
5 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
6 party failed to make a showing sufficient to establish an element essential to that party’s case on  
7 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If  
8 the moving party fails to meet its initial burden, summary judgment must be denied and the court  
9 need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.  
10 144, 159–60 (1970).

11 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
12 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
13 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of  
14 material fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,  
15 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to  
16 require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

17 In other words, the nonmoving party cannot avoid summary judgment by relying solely  
18 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d  
19 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
20 allegations of the pleadings and set forth specific facts by producing competent evidence that  
21 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

22 At summary judgment, a court’s function is not to weigh the evidence and determine the  
23 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*  
24 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all  
25 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the  
26 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
27 granted. *See id.* at 249–50.

28 . . .

1     **III.     Discussion**

2             Plaintiff brings a negligence claim for each of her slip-and-fall incidents. “It is well  
3     established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the  
4     existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages.”  
5     *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009) (citing *Turner v. Mandalay*  
6     *Sports Entm’t, LLC*, 180 P.3d 1172, 1175 (Nev. 2008)). The court will discuss each slip-and-fall  
7     incident in turn.

8             A. *First slip-and-fall incident*

9             Plaintiff moves for summary judgment for the first incident, arguing all elements of  
10     negligence have been met. (ECF No. 40). However, defendant argues that causation cannot be  
11     met as to the first incident because plaintiff was contributorily negligent. (ECF No. 46).

12             Ordinarily, the existence of contributory negligence is a question of fact; it becomes a  
13     question of law when the evidence will support no other inference. *Wagon Wheel v. Mavrogan*,  
14     369 P.2d 688 (Nev. 1962). Additionally, all justifiable inferences must be viewed in the light  
15     most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475  
16     U.S 574, 587 (1986).

17             The video footage shows the employees mopping large amounts of water and putting  
18     paper towels down where plaintiff could see them. (ECF No. 44-4). Several other customers  
19     walked by and noticed the water and avoided falling. *Id.*

20             Viewing the video footage in the light most favorable to the defendant, a reasonable jury  
21     could find that plaintiff was contributorily negligent for not noticing the water. Plaintiff even  
22     states in her motion for summary judgment, “[there was] a massive amount of water coming  
23     from the left side of the bulk deli counter.” (ECF No. 40 at 3).

24             There is a dispute of material fact whether plaintiff was comparatively negligent for not  
25     noticing the water. Thus, plaintiff’s motion for partial summary judgment as to the first slip-and-  
26     fall is denied.

27     ...

28     ...

1           *B. Second slip-and-fall incident*

2           Both parties move for summary judgment for the second incident. Plaintiff argues that  
3 all the elements of negligence have been met. Defendant makes a variety of different arguments  
4 both in opposition to plaintiff's summary judgment and in support of its own summary judgment  
5 motion. The court agrees with defendant's argument that a dispute exists to whether duty was  
6 met. (ECF No. 40, 46).

7           A business owes a duty to its patrons "to keep the premises in a reasonably safe condition  
8 for use." *Sprague v. Lucky Stores, Inc.*, 849 P.2d 320, 322 (Nev. 1993). Duty is triggered when  
9 a temporary hazardous condition is on the property. *Eldorado Club v. Graff*, 377 P.2d 174, 176  
10 (Nev. 1962); *see also Asmussen v. New Golden Hotel Co.*, 392 P.2d 49, 50 (Nev. 1964) ("The  
11 presence of a foreign substance on a floor generally is not compatible with the standard of  
12 ordinary care."). The owner's duty regarding a temporary hazard varies depending on the  
13 condition's cause. *Eldorado Club*, 377 P.2d at 176.

14           If an agent or employee of the defendant causes the temporary hazardous condition, then  
15 "liability may be found upon ordinary agency principles; respondeat superior is applicable, and  
16 notice is imputed to the defendant." *Id.* at 175. Alternatively, a defendant may be liable for a  
17 temporary hazardous condition caused by third parties if the defendant had either actual or  
18 constructive notice of the hazard. *FGA, Inc. v. Giglio*, 278 P.3d 490, 496 (Nev. 2012). Whether  
19 they were under constructive notice of the hazardous condition is, in accordance with the general  
20 rule, a question of fact properly left for the jury. *Sprague*, 849 P.2d at 323.

21           Here, the video footage shows a customer spilling a drink near the checkout line. (ECF  
22 No. 44-5). The customer then received paper towels from the employee and cleaned up the area,  
23 but there is no sound on the video to determine what the customer said to the employee. *Id.* No  
24 employees took further measures to clean the spill, and plaintiff then slipped in the same area a  
25 short while later. *Id.*

26           Because there is no sound in the video, it is unclear whether defendant was on actual or  
27 constructive notice about the spill. A reasonable jury could determine that defendant had notice  
28 when the employee handed the customer paper towels because the customer told them about the

1 spill. However, a reasonable jury could also determine that defendant was not told about the  
2 spill and that the customer simply asked for paper towels, which would not put defendant on  
3 notice.

4 As this dispute of material fact still exists, both plaintiff's and defendant's partial motions  
5 for summary judgment as to the second slip-and-fall incident will be denied.

6 *C. Third slip-and-fall incident*

7 Defendant moves for summary judgment for the third incident, arguing that plaintiff will  
8 be unable to prove causation or damages because the only witness available to testify will be the  
9 expert witness, Dr. Muir.<sup>1</sup> (ECF No. 41). Plaintiff, however, argues that the treating physicians  
10 will be able to testify as non-retained experts and are not subject to the expert witness  
11 disclosures. (ECF No. 44).

12 “Generally, a treating physician is not ‘retained or specially employed to provide expert  
13 testimony’—a treating physician is a percipient witness of the treatment he rendered—and  
14 therefore he is not subject to the written report requirement.” *Goodman v. Staples the Office*  
15 *Superstore*, 664 F.3d 817, 824 (9th Cir. 2011) (citing Fed. R. Civ. P. 26(a)(2) advisory  
16 committee's note (1993)).

17 Instead, the only required disclosures for treating physicians are for “the subject matter  
18 on which the witness is expected to present evidence under Fed. R. Evid. 702, 703, or 705 and a  
19 summary of facts and opinions to which the witness is expected to testify.” Fed. R. Civ. P.  
20 26(a)(2)(C).

21 Here, plaintiff has met both requirements. Plaintiff provided a list of treating physicians,  
22 along with both the subject matter and a summary of facts and opinions that the witnesses are  
23 expected to testify on. (ECF No. 44-1 at 100). Plaintiff will be able to provide testimony from  
24 the treating physicians, to the extent they formed those opinions during the course of her  
25 treatment, for both causation and damages without transforming the witnesses into experts.

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27  
28 <sup>1</sup> Defendant also makes this argument for second incident. The court holds that this  
analysis would apply the same for both incidents.

1 There is a genuine issue of material fact regarding causation and damages, as the court does not  
2 have testimony from the treating physicians currently.

3 Thus, defendant's partial motion for summary judgment as to the third slip-and-fall  
4 incident will be denied.

5 **IV. Conclusion**

6 Accordingly,

7 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for  
8 partial summary judgment (ECF No. 40) be, and the same hereby is, DENIED.

9 IT IS FURTHER ORDERED that defendant's motion for partial summary judgment  
10 (ECF No. 44) be, and the same hereby is, DENIED.

11 DATED March 16, 2020.

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UNITED STATES DISTRICT JUDGE